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IN THE

Supreme Court of the United States

October Term, 1970

No. 553

JAMES ALFRED MARTIN, doing business as
SILKO NEW IMPROVED PRODUCTS COMPANY,
Petitioner,

v.

CROWN ZELLERBACH CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

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Birmingham Publishing Company

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

The petitioner, James Alfred Martin, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Customs and Patent Appeals entered in this proceeding on March 26, 1970, a petition for rehearing having been denied on May 21, 1970.

OPINIONS BELOW

The opinion of the Trademark Trial and Appeal Board of the United States Patent Office, reported at 153 USPQ 141, appears in Appendix B. The opinion of the United States Court of Customs and Patent Appeals, reported at 442 F.2d 918; 165 USPQ 171; 57 CCPA ____, appears in Appendix C. The order on rehearing of the United States Court of Customs and Patent Appeals appears in Appendix D.

JURISDICTION

The judgment of the United States Court of Customs and Patent Appeals was entered on March 26, 1970. A timely petition for rehearing was denied on May 21, 1970, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under both 28 U.S.C. Sec. 1256 and 15 U.S.C. Sec. 1122.

QUESTIONS PRESENTED

1. Can the fundamental right to own a Family trademark for the identification of goods, which right is implicit in traditional American freedom, the Constitution, the common law and federal trademark statutes, be abridged by a limited trademark under the Trademark Act of 1946?

2. Can trademark rights in distinctive lettering acquired under the Trademark Act of 1905, as amended, by prior adoption, use and registration, be destroyed in an opposition proceeding before the Trademark Trial and Appeal Board under the Trademark Act of 1946?

3. Can trademark rights in the field of toilet goods, which rights were acquired under the Trademark Act of 1905, as amended, and the Trademark Act of 1946, as amended, be limited by variable, inconsistent and inadequate classification of goods in said field by the Patent Office?

4. Can the United States Court of Customs and Patent Appeals affirm a holding of the Trademark Trial and Appeal Board giving respondent a monopoly in the use of a portal suggestive word as a trademark when monopolies in the use of such words as trademarks are contrary to prior opinions of the Supreme Court of the United States?

5. Can trademark rights be created by the Trademark Trial and Appeal Board under the Trademark Act of 1946, as amended, using dollar-volume of sales of toilet paper as an index, to the detriment of a primary value trademark used on cosmetics and medicinals, when the intent of said Act was regulatory and protective and there is neither provision nor guideline therein for equating trademark rights to dollars.

6. Can the United States Court of Customs and Patent Appeals hold not appealable the Board's denial of a timely motion by petitioner to narrow the description of goods in the application when said description and applicant's labels do not agree because of the inadequacy and inconsistency of classification of toilet goods by the Patent Office?

7. Can the Trademark Trial and Appeal Board hold that single ply and two-ply toilet tissue are the same when the

Patent Office previously granted a patent to the inventor of 2-ply toilet tissue?

STATUTORY PROVISIONS INVOLVED

(See Appendix "E" for pertinent text)

Constitution of the United States.

Trademark Act of 1905, as amended; 33 Stat. 724, 15 USC 81.

Trademark Act of 1946, as amended; 60 Stat. 427, 15 USC 1051.

Rules of Practice of the Patent Office.

Patent Office Classification of Goods and Application Form 4.1.

STATEMENT UNDER RULE 33 (2) (b)

Since the proceeding draws into question the constitutionality of the Act of July 5, 1946, 60 Stat. 427, 15 USC 1051, an Act of Congress affecting the public interest, and neither the United States nor an agency, officer or employee thereof is a party, it is noted that 28 USC Sec. 2403 may be applicable.

No court of the United States as defined by 28 USC Sec 451 has, pursuant to 28 USC Sec. 2403, certified to the Attorney General the fact that the constitutionality of such Act of Congress has been drawn in question.

STATEMENT OF THE CASE

Petitioner, an individual residing and doing business in Alabama, sought to expand in the toilet goods field his family trademark to facial tissue on rolls, commercially "2-ply facial quality, toilet tissue, 1000 sheets (500 2-ply)" or commonly "toilet tissue". The trademark sought to be registered, shown in appendix A at page 12, is a composite one containing seven distinctive features analogous to the features of the human face but represented symbolically. Petitioner's toilet goods are principally used for the hair, and for many years petitioner has extensively used containers bearing a picture of a woman's face and hair on the lid with the curved, capitalized SILKO. See the photograph of the lithographed Hair Gloss can (Pl. Ex. 6; R 59, 123). The symbolic representation of the face in the present trademark is confined to the upper

two-thirds of the circular area, reserving the lower one-third of the area for information relative to the contents, thereby obviating the necessity for a paper label around the body of the container when jars made of glass or plastic are used as containers.

The curved, capitalized SILKO trademark was first registered in 1916 for medicated hair dressing by petitioner's father, a druggist, who started the business in 1914 using the curved, capitalized SILKO mark as well on skin ointment, medicated soap and hair gloss, and who was selling unlabeled single ply toilet paper in his drug store at the time.

Opposition was made by respondent paper manufacturer, a Nevada corporation of San Francisco, California, on the basis of ownership from a predecessor-in-interest of the toilet-paper trademark SILK, a word which the Trademark Trial and Appeal Board found suggestive of the product, and which was further used as a trademark on 2-ply handkerchief-size facial tissue in boxes since 1940.

In addition to having available a number of trademarks for toilet paper, respondent claimed to have used petitioner's Family mark on toilet paper around 1940 for a short time.

Respondent claimed sales of a quantity of SILK toilet paper, expressed in dollars, since 1935.

Respondent's single ply toilet tissue, 650 sheets to the roll, and petitioner's 2-ply facial quality toilet tissue, 1000 sheets (500 2-ply) are not competitive, the respondent's product being significantly and advantageously in a lower price class, and as can be seen from the number of sheets per roll, the price of respondent's product would be about two-thirds that of petitioner's product, a fact immensely important in toilet tissue sales.

The Trademark Trial and Appeal Board was impressed by respondent's toilet paper sales in dollars but unimpressed by the important differences in the marks, and holding, contrary to the evidence, that the goods were basically the same, sustained the opposition.

The United States Court of Customs and Patent Appeals supported the Board's erroneous finding with respect to the

goods on the basis of the common general description of the goods and affirmed the decision.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH TRADITIONAL AMERICAN LIBERTY, THE DECLARATION OF INDEPENDENCE, THE CONSTITUTION, THE COMMON LAW AND FEDERAL TRADEMARK LAWS AS TO THE FUNDAMENTAL RIGHT TO HAVE A TRADEMARK FOR A FAMILY BUSINESS.

American tradition is rich in the concept of liberty and Patrick Henry's speech in 1775 is a familiar quotation: "* * * * * * Is life so dear or peace so sweet as to be purchased at the price of chains and slavery? * * * *.* Give me liberty or give me death!" The Declaration of Independence adopted in 1776 stated that life, liberty and the pursuit of happiness were inalienable rights of all. In Philadelphia there was the Liberty Bell in Independence Hall and in New York harbor the Statue of Liberty. One of the purposes of the Constitution, as set forth in the preamble, was to secure the blessings of liberty "to ourselves and our posterity."

Trademark rights originated as part of the common law and existed long before Congress passed the first Act in 1870 to provide registration as a means for protecting trademarks. Parsons' LAWS OF BUSINESS, published by the S.S. Scranton Co., copyright 1911, stated in part as follows with respect to trademarks on page 689:

"By the common law a merchant or manufacturer is entitled to the exclusive use of a "trade mark" to designate his goods, provided he has used it so long that it has become generally recognized as his.

The trade-mark may consist of words, letters, figures, or drawings, or a combination of two or more of them.

It must, however, indicate only the origin or ownership of the goods to which it is applied, and not be descriptive of their character, quality, or composition.

[1]Macaulay v. Malt-Diastase Co., 4 F.2d 944,945 (1925).

Thus, for example, a miller may mark his flour with the figure of an eagle or with the name of his mill, and these marks will after a time be recognized as indicating that the flour so marked is made by him or at his mill.

But he cannot appropriate to his exclusive use such words as 'snow white,' 'superfine,' 'family flour,' or any other descriptive term, as any other person manufacturing a similar article has a right to describe it by any appropriate language." (Emphasis added).

By the application of federal statutes, trademarks are divisible into two basic groups: protected and unprotected marks. Protected marks are those which are able to pass federal standards of registration for protection.

Relative to the present proceeding trademarks which enjoy federal protection may be divided into two groups; namely, limited trademarks used in a single class and unlimited trademarks used in many classes. Unlimited trademarks possess originality, distinguishing features, and have been consistently used for a long time. If the unlimited mark is the sole mark of a family business, it acquires a status, meriting not only the protection accorded trademarks under the federal statutes but also protection given family life under the laws of nations.

To have family life it is necessary to have both a homestead and a family business, which includes a trademark for identification of goods. There are three crimes against family life that are punishable under all codes of laws: (1) crime against the head of a family (murder), crime against his wife (adultery), and crime against his homestead and family business (larceny).

Slaves have life, can pursue happiness but they lack the liberty to sustain their lives by family businesses, and their status as slaves is irrespective of their pay. The real meaning of liberty is family-business liberty, which is the distinguishing feature between freedom and slavery.

To permit impairment of family trademarks is to close the door of freedom which our forefathers struggled so hard to open, and in so doing the door to piracy of trademarks is opened, thereby legalizing larceny of a family business, which

cannot be legalized. To try to do so is to compound the crime and make criminals of those attempting it.

Today, polluters are destroying life, monopolists are destroying family-business liberty and Americans are being deprived of the pursuit of happiness with their families. This is a most serious matter. Family life is the basis for the development of character, and its protection is most important for the national interest.

In the present proceeding, petitioner has a family-business trademark which was adopted, used and registered before that of the respondent. The mark is coined, possesses inherent distinctiveness, has always been used in capital letters, and in classes 6, 15, 18, 51 and 52 has been used with curved letters. The color red has always been used. The position of the trademark is similar on goods in some of the classes. Petitioner's mark sought to be registered is a composite mark with seven distinctive features as distinguishable as those of the human face, and the product upon which used and here involved is facial tissue on rolls, which is within the field of toilet goods. The SILKO mark has acquired the status of a family mark by long and consistent use for over a half century and cannot be impaired by respondent's limited mark.

2. THE DECISION BELOW, CONSIDERING QUESTIONS NO. 2 and NO. 5 supra, CONFLICTS WITH OPINIONS OF THIS COURT AS TO THE POWER OF CONGRESS TO CHANGE SUBSTANTIVE TRADEMARK RIGHTS IN A STATUTE INTENDED TO PROTECT TRADEMARKS UNDER THE COMMERCE CLAUSE OF THE CONSTITUTION.

The Trademark Trial and Appeal Board has destroyed petitioner's registered rights in the distinctive curved capitalized letters of SILKO and at the same time has created rights for the respondent on the dollar-deceptive basis of sales of toilet paper. For example: (see Appendix B) the Trademark Trial and Appeal Board said: * * * * * "Likewise, any differences in the color and style of lettering of the marks utilized by the parties are of no particular significance in resolving the issue before us since the display of the marks can be changed

at any time at the whim and fancy of either party." * * * *. The drawings of petitioner's trademarks in classes 6 and 51, Registrations 112,554 (Pl. Ex. 1; R. 49, 120) and 596,487 (Pl. Ex. 4; 55,122), respectively, show the curved capitalized letters which are distinctive of SILKO. The drawings of petitioner's trademarks in classes 15, 18 and 52, Registrations 792,481; 592,386; 598,889; respectively, (R. 208, footnote (4); Pl. Ex. 3; R53,121; and Pl. Ex. 5; R. 57,122), are shown in capitalized letters which are correctable to curved letters pursuant to Sec. 7 (d) of the Trademark Act of 1946. (see Appendix E.)

On the other hand, the Trademark Trial and Appeal Board created trademark rights for the respondent, which rights do not exist under the Act, by stating: * * * * "Moreover, notwithstanding the fact that "Silk" is a dictionary term and any possible significance or suggestive connotation that it may engender as applied to toilet tissue, it seems clear from the record presented that by reason of extensive use and sales by opposer and its predecessors for over thirty years, the mark "Silk" has acquired distinctiveness as an indication of origin for opposer's toilet tissue and constitutes a valuable property rght for opposer." * * * *. All toilet paper sells in high volume and after a period of time all trademarks can show long usage. The Board has changed the established law against use of suggestive words as trademarks thereby withdrawing them from public use, and has supported the respondent on an untenable basis.

The decisions of this Court in The Trademark Cases, 100 U.S. 82 (1879) at page 96 and in Leschen Rope Co. v. Broderick, 201 U.S. 166 (1905) at page 169 reflect the inability of Congress to change substantive trademark rights in a protective Act under the commerce clause of the Constitution. See also Macaulay v. Malt-Diastase Co., 4 F.2d 944 (1925) at pages 944, 945. The Trademark Trial and Appeal Board, deriving its powers from the 1958 Amendment to the Trademark Act of 1946, can neither create nor destroy substantive trademark rights in opposition proceedings. The intent of

the Trademark Act of 1946, set forth in Appendix F, indicates the purely regulatory and protective nature of the Act.

3. THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING PROBLEMS CONCERNING THE INADEQUACY AND INCONSISTENCY OF THE CLASSIFICATION OF GOODS BY THE PATENT OFFICE IN THE FIELD OF TOILET GOODS AND THE NEED OF UNIFORMITY FOR EFFICIENCY AND FOR PROTECTION OF RIGHTS.

The first trademark Act was passed in 1870 but the classification of goods was not established until the Act of 1906 which amended the Trademark Act of 1905. See Appendix F. Thus, there was a 36 year lag in the establishment of the classes of goods.

The cosmetic industry started several years prior to 1930 (R. 149, Q 165 and 166) and Kleenex was marketed in small size sheets, 5" x 6", to remove face creams. Also, POND'S had a tissue paper for removing cold cream, TM 260,985, Registered in 1929 (424 OGT 566).

As can be seen from the classification of goods in Appendix E, Class 51 for cosmetics and toilet preparations was not established until 1949. Again, there was a lag of over 20 years in the classes of goods. Toilet goods are registered in many classes, instead of a single class as is the case with foods, electrical appliances, drugs, etc., and this necessitates many trademark registrations and deprives petitioner of priority in the field. For example, the Trademark Trial and Appeal Board, in its opinion, said that cosmetics and facial tissue were alien fields. See Appendix B, P. 995 / 19. Facial toilet goods and facial toilet tissue are two-thirds alike in name. Examination of the list of the classification of goods will show that all the other classes are even more "alien" than that for facial tissue.

The inadequacy and inconsistency of the registration of tissue paper is seen from a comparison with the registration of petroleum jelly, an item which likewise has many different uses. Petitioner sells petroleum jelly in class 15 for household use, in class 18 for medicinal use, and in class 51 for cosmetic use, the material being the same in all three classes. No diffi-

culty is experienced with this multiple class registration. However, in the case of tissue paper, all types must be registered in class 37 regardless of the use. Petitioner submits that facial tissue should be either registrable in class 51 or the Trademark Trial and Appeal Board should recognize the overlap area and not limit petitioner's rights, as provided in Sec. 30 of the Act, which reads: "The Commissioner may establish a classification of goods and services, for convenience of Patent Office administration, but not to limit or extend the applicant's rights. * * * *" (Emphasis added).

4. THE DECISION BELOW CONFLICTS WITH OPINIONS OF THE SUPREME COURT OF THE UNITED STATES AS TO THE AVOIDANCE OF THE WITHDRAWAL OF SUGGESTIVE WORDS FROM PUBLIC USE AS TRADEMARKS AND THE MONOPOLY THEREOF BY REGISTRATION.

In American Steel Foundries v. Robertson, Comr., 269 U.S. 372 (1925), this Court in its opinion, quoting the Commissioner of Patents, said at page 383: * * * "The word (simplex) involved in this case is one of a large class of words which have for a great many years been much used because of their peculiar suggestive meaning. For other examples there are the words 'Acme', 'Anchor', 'Champion', 'Eureka', 'Excelsior', 'Ideal', 'Jewel', 'Liberty', 'National', 'Pride', 'Premier', 'Royal', 'Star', 'Sunlight', 'Triumph', 'Victor'. It would be a serious matter if the law actually permitted any one who chose to do so to organize a series of corporations with names containing these words, respectively, and thereupon virtually withdraw these words from public use as trademarks and monopolize them by preventing their registry as such." * * * *

In Brown Chemical Co. v. Meyer, 139 U.S. 540 at 542, this Court said: "The general proposition is well established that words which are merely descriptive of the character, quality or composition of an article, or of the place where it is manufactured or produced, cannot be monopolized as a trade mark". * * *. At page 544 it stated: * * * "its (The law) tendency is rather to discourage monopolies, except where protected by statute. * * * *"

The word "Silk" has been used in more than 100 trademarks by others and the list below exemplifies a few of the ways in which others have used the word:

SMOOTH AS SILK	812 OGT 179
FOAM SILK	843 OGT 233
SILK-TONE	811 OGT 75
SUN SILK	813 OGT 173
SILK 'N HONEY	814 OGT 170
CORN SILK	818 OGT 24
COLORSILK	820 OGT 96
SEED SILK	822 OGT 68
SILK SPONGE	823 OGT 137
SILK 'N SATIN	827 OGT 39
COLOGNE SILK	831 OGT 88
MILK SILK	855 OGT 73
BLONDSILK	837 OGT 179
ULTRASILK	837 OGT 179
BODY SILK	855 OGT 167
POWDERED SILK	857 OGT 79

The respondent's predecessor-in-interest has taken the word "Silk" without any additional features for use as a trademark. The word is similar to the suggestive words listed in the case of American Steel Foundries v. Robertson, supra, and no manufacturer can monopolize a suggestive word.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Customs and Patent Appeals.

Respectfully submitted.

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August 7, 1970

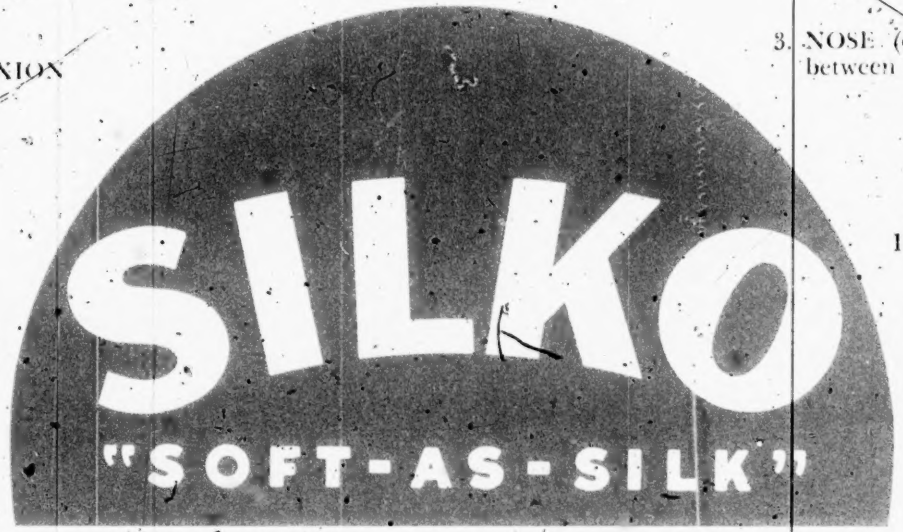
5. FOREHEAD (crescent)

7. RUDDY COMPLEXION (red color)

3. NOSE (curved area between eyes)

1. EYE (winking)

2. CHEEK



1. EYE (open)

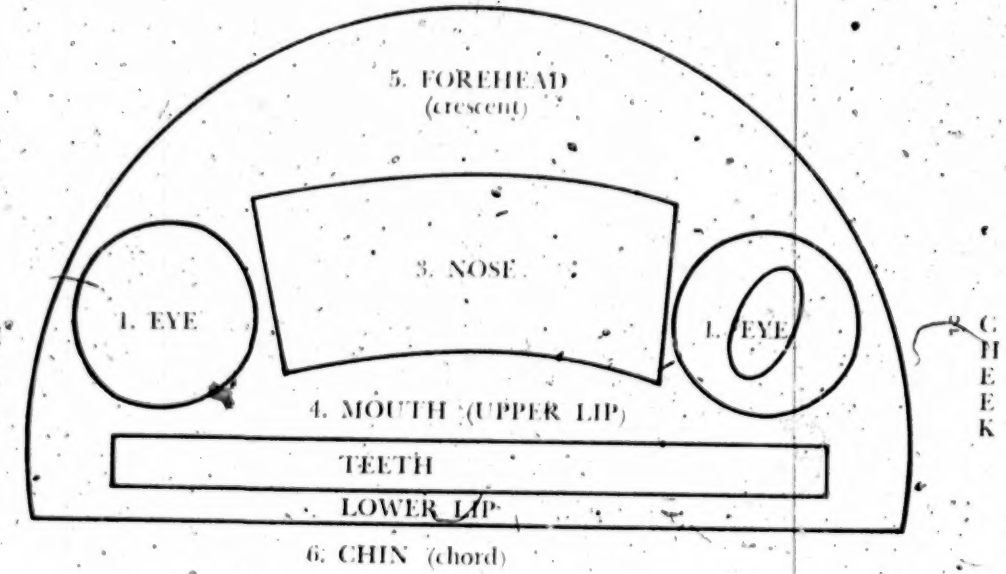
2. CHEEK

4. MOUTH, consisting of
a. UPPER LIP (segment)
b. TEETH (phrase "SOFT-AS-SILK")
c. LOWER LIP (area below phrase)

6. CHIN (chord)

THE SILKO FACE-SYMBOL TRADEMARK

The seven distinguishing features of the human face embodied and represented by symbols in a trademark.



THE SILKO FACE-SYMBOL TRADEMARK

Diagrammatic representation of the seven features of the human face embodied and represented in a trademark

APPENDIX B

DECISION OF TRADEMARK TRIAL AND APPEAL BOARD, JANUARY 31, 1967.

U. S. DEPARTMENT OF COMMERCE
PATENT OFFICE

Trademark Trial and Appeal Board

Crown Zellerbach Corporation

v.

James Alfred Martin

Opposition, No. 45,058 to application Serial No. 198,623 filed July 24, 1964.

R. W. Skirvin and William K. Quarles, Jr. for Crown Zellerbach Corporation.
James Alfred Martin, pro. se.

Before Leach, Lefkowitz, and Shryock, Members.
Opinion by Lefkowitz, Member:

An application has been filed by James Alfred Martin, doing business as Silko New Improved Products Company, to register the mark reproduced below for toilet tissue, use of the mark since May 3, 1963 being asserted.



The drawing is lined for the color red, and the words "SOFT-AS-SILK" are disclaimed apart from the mark as shown.

124 Applicant is the owner of a number of registrations consisting of, or comprising the designation "SILKO" razor

for hair dressing, [razon] blades, sun tan lotion, medicated beauty cream, perfume, soap, shampoo, and similar goods.[1]

Registration has been opposed by Crown Zellerbach Corporation, which alleges that applicant's mark so resembles "SILK" alone and/or in combination with such other words as "NAPS" and "WAX" previously and continuously used by opposer and its predecessors in business for various paper products, including toilet tissue as to be likely, when applied to applicant's goods, to cause confusion or mistake or to deceive.

Applicant, in its pleading, has denied the allegation of likelihood of confusion and, as an affirmative defense, has asserted, inter alia, that:

> "Applicant is the prior user in interstate commerce and the prior registrant of the trademark "SILKO" for cosmetics and toilet preparations; and under established principles of common law and federal trademark law is thereby entitled to use and register said trademark on all closely related goods, including facial tissues, and facial-quality toilet tissues, which are extensively used to remove cosmetics and for handkerchiefs, and are closely

[1] Reg. No. 112,551, issued Sept. 12, 1916, twice renewed; and published under Sec. 12(c) of the Act of 1946 on Feb. 2, 1965; Reg. No. 591,104, issued June 15, 1954; Reg. No. 592,386, issued July 13, 1954; Reg. No. 596,487, issued Oct. 5, 1954; and Reg. No. 598,889, issued Nov. 30, 1954.

[2] Opposer is the owner of Reg. No. 254,779, issued Apr. 2, 1929 to a predecessor, renewed, and published under Sec. 12(c) of the Act of 1946 on Apr. 20, 1948 the mark "SILK" for toilet paper; Reg. No. 385,382, issued Feb. 25, 1941 to a predecessor, renewed, and published under Sec. 12(c) of the Act of 1946 for the mark "SILK" for paper towels and facial tissue; Reg. No. 387,500, issued May 20, 1941 to a predecessor, renewed, and published under Sec. 12(c) of the Act of 1946 Apr. 6, 1948 for the mark "SILK-NAPS" for paper napkins; Reg. No. 392,177, issued Dec. 16, 1941 to a predecessor and renewed for "SILK-WAX" for waxed paper; and Reg. No. 580,312, issued Sept. 22, 1953 for "SILK" for paper napkins, facial tissue, waxed paper, shelf paper, and toilet tissue.

associated in the minds of consumers and the general public with cosmetic products."

125 Both parties have taken testimony.

Opposer's testimony reveals that opposer and its predecessors have, since at least as early as November 12, 1935, continuously used the designation "SILK" as a trademark for paper products, including toilet tissue, facial tissue, and napkins.[3] The mark "SILK" has been applied to the wrappers and containers or packages for the goods. "SILK" paper products, including toilet paper or toilet tissue, have been sold to wholesalers, jobbers, grocery chains, and the like. These products have been distributed roughly throughout the Western half of the United States with the probability, as testified to by one of opposer's witnesses, that products purchased by wholesalers and pobbers could have been shipped across the Mississippi River to the Eastern portion of the United States. During the period from November 13, 1935 through April 30, 1952, the total sales of opposer's predecessor company exceeded four and one half million dollars, of which seventy percent represented sales of "SILK" toilet paper. The total sales of "SILK" toilet paper from May 1, 1952 to August 31, 1965 approximated twenty-three million dollars.

Opposer's record including price lists shows that, for some indefinite period around 1940, opposer marketed a toilet tissue under the mark "SILKO".

Applicant's record indicates that Silko New Improved Products Company was started in 1914 and that since about May 1916 it has been marketing in interstate commerce a variety of drugs, cosmetics, and toilet preparations under the mark "SILKO" including a hair dressing, razor blades, per-

126 fume, petroleum jelly, shampoo, and a detergent. A number of applicant's products such as the petroleum jelly, detergent, and hair dressing are sold in containers bearing the identical mark sought to be registered herein.[4] There

[3] In addition to the registration pleaded in the notice of opposition, the record shows that opposer is the owner by mesne assignment of Reg. No. 243,603, issued June 26, 1928 and renewed covering the mark "SILK" for toilet paper.

[4] Applicant is also the owner of Reg. No. 792,481, issued July 13, 1965 for the mark "SILKO" for a petroleum jelly for household use.

is testimony that "SILKO" facial or toilet tissue was available for sale by applicant in 1949 and that since 1954 "SILKO" facial tissues have been advertised on the containers for applicant's cosmetic products; but admittedly no sales of toilet tissue or facial tissue were made prior to May 3, 1963 when toilet tissue was first sold by applicant under the composite mark in question. Applicant's toilet tissue is facial quality tssue on rolls and has been sold to sundry type stores, five-ten cent or variety stores, grocery stores, beauty shops, commissaries, and like outlets. The mark is applied to a label which is attached to a clear plastic bag holding one or four rolls or to the outside of a case or carton in bulk packaging. Less than one hundred cases of toilet tissue have been sold by applicant.

Applicant has made of record copies of three registrations issued to third persons, namely, Reg. No. 177,499, issued December 18, 1923 and renewed for the mark "SILKRÊPE" for crepe paper; Reg. No. 219,367, issued October 19, 1926 and renewed for the mark "PARASILK" for barber's headrest paper toilet paper, and paper for lining shelves, drawers, and for similar household purposes, and Reg. No. 504,306, issued November 30, 1948 for the mark "SILKLYK" for crepe paper.

Opposer, in an effort to offset any inference that could be drawn by these third party registrations, noticed during its rebuttal period copies of official office records which 127 reveal that opposer was successful in cancelling the registration of "SILK TISSUE" for wrapping paper[5] and the registration of "SOFTASILK" for facial cleansing tissues.[6]

Opposer's record including copies of its subsisting registrations are sufficient to establish opposer's prior rights in "SILK" for toilet tissue.[7] Insofar as applicant's affirmative defense is concerned, applicant's registrations and long and extensive use of "SILKO" alone and as a part of a composite mark with the slogan "SOFT AS SILK" and, at times, superimposed on red,

[5]Reg. No. 185,093, issued June 10, 1923.
[6]Reg. No. 595,710, issued Sept. 21, 1954.
[7]Opposer's registrations covering the marks "SILK-NAPS" and "SILK-WAX" are likewise sufficient to establish its prior rights in these marks for paper napkins and waxed paper, respectively. But, since the most pertinent of opposer's marks, for purposes herein, is "SILK", per se, for toilet paper, no further reference will be made herein to the other two marks.

semi-circular design for drug, cosmetic, and toilet preparations such as hair dressing, razor blades, and petroleum jelly products can be of no avail to it in this proceedin.[8] Cosmetics and toiletries, on the one hand, and paper tissue, whether of facial quaility or not, on the other hand, are distinctly different kinds of goods that fall within distinctly different fields of trade; and it has not been demonstrated that it is within the natural or normal expansion of the activities of a cosmetic or toiletry manufacturer to extend its business from such products to toilet tissue. Under these circumstances, applicant's prior use and registration of "SILKO" for cosmetic and toilet preparations without any objection by opposer cannot serve to sanction the use therefore in connection with goods of an entirely different character in an alien field of trade if such use is likely to be in conflict with a mark previously used by opposer in said field with the resultant confusion in trade. See:

Purex Corporation Ltd. v. the Maryland Paper Prod-
128 ucts Co., 129 USPQ 59 (CCPA, 1961); Contour Chair-Lounge Co. Inc. v. The Englander Company, Inc. 139 USPQ 285 (CCPA, 1963); and Sterling Drug Inc. et al. v. Sun Chemical Corporation 142 USPQ 330 (TT&A Bd., 1964), and cases cited therein.

Turning now to the question of likelihood of confusion involved in this proceeding and first to a consideration of the goods of the parties, the record shows that both parties use their respective marks in connection with the sale of toilet tissue. Applicant has attempted to make certain distinctions between the products of the parties as to physical characteristics, channels of distribution, methods of sale, and the like. These are distinctions without substance. Tiolet tissue is for all purposes toilet tissue; and since there is no limitation in either applicant's application or opposer's registrations covering toilet paper as to qualty, manner of hand-

[8]Applicant has sought to make much of the fact that the record is devoid of any evidence of actual confusion. It is well settled, however, that actual confusion need not be established to show that a likelihood of confusion exists under the facts adduced in a proceeding of this character. See: Pink Lady Corporation v. L. N. Renault & Sons, Inc. 121 USPQ 465 (CCPA, 1959).

ling the product, the channels of distribution, or the size or number of uiles thereof, it must be assumed for all intents and purposes herein that applicant's toilet tissue is basically the same as opposer's toilet tissue and that these products move through the same channels of trade to the same classes of purchasers. See: Myer Chemical Company v. Anahist Co., Inc., 120 USPQ 483 (CCPA, 1959); California Stucco Products of New England, Inc. v. Maas & Waldstein Co., 124 USPQ 75 (CCPA, 1959); The Russell Chemical Cheniical Company v. Wyandotte Chemicals Corporation, 143 USPQ 252 (CCPA, 1964). There can be no question but that the sale of these goods under the same or similar marks would be likely to cause purchasers to ascribe a common origin or association thereto.[9]

It is believed necessary before going into a consideration of the marks of the parties to point out that any differences in the wrappings, dabels, and packaging of the products are matters which are immaterial and irrelevant to the question of whether or not applicant's mark as shown in the drawing of the application is confusionly similar to opposer's registered Tas-T-Nut mark "SILK". See: The [Tast-T-Nut] Company v. Variety Nut & Date Company, 128 USPQ 166 (TT&A Rd., 1961); and cases cited therein, affirmed 134 USPQ 349 (CCPA, 1962). Likewise, any differences in the color and style of lettering of the marks utilized by the parties are of no particular significance in resolving the issue before us since the display of the marks can be changed at any time at the whim and fancy of either party. See: Brewing Electric Mfg. Co., v. Breuer

[9]The fact, as urged by applicant, that the parties may presently be selling their toilet tissue in different areas of the country is of no particular significance herein because opposer, as the prior user and registrant of the mark "SILK" for toilet tissue, is entitled to a presumption of use throughout the United States and applicant moreover, is seeking a territorial unrestricted registration for its mark. See: Ben-Hur Products, Inc. v. Golden State Compnay Ltd., 97 USPQ 276 (Comr., 1953).

[Matter enclosed between brackets erased in copy.]

Vornado, Inc., 147 USPQ 370 (TT&A Bd., 1965., 1965), and cases cited therein.

Insofar as the marks in issue are concerned, it is opposer's position that the dominant part of applicant's marks is the designation "SILKO"; "SILK" and "SILKO" are substantially alike in both sound and appearance; and the addition to applicant's mark of the red background and the disclaimed slogan "SOFT As SILK" are not sufficient to overcome the similarities between "SILK" and "SILKO" and avoid a likelihood of confusion in trade. Applicant, on the other hand, argues that "SILK" is a higly suggestive word as applied to toilet paper and is in effect, a "weak" mark entitled to comparatively little protection; ["SILK"] by contrast is a coined word having no significence as applied to the goods and is neither identical to nor confusingly similar to "SILK"; and that when applicant's complete or entire trademark is compared to opposer's single word trademark "SILK", as it must be, the differences between them are readily apparent and serve to eliminate any possibility of confusion of the source of the products sold thereunder.

130 "SILKO"

There is no doubt that the word "SILK" possesses a suggestive connotation as applied to toilet tissue; but it is not devoid of trademark significance. The three third-party registrations referred to by applicant are not evidence of use of "SILK" by "a multitude of merchants" nor do they show that "SILK" is a part of the trademark of "many others" as contended by applicant. Significantly, each of these registrations issued on applications filed subsequent to the application which matured in opposer's Reg. No. 254,779 and two of the registrations cover goods distinctly different from toilet paper. These registrations are manifestly insufficient to establish that "SILK" is a "weak" mark in the tissue field. See: In re Helene Curtis Industries, Inc., 134 USPQ 501 (CCPA, 1962); J. C. Hall Company v. Hallmark Cards, Incorporated, 144 USPQ 435 (CCPA, 1965); and Milani Foods, Inc. v.

[Matter enclosed between brackets erased in copy.]

Gulfstream Packing Co., Inc., 137 USPQ 460 (TT&A Bd., 1963). Moreover, notwithstanding the fact that "SILK" is a distionary term and any possible significance or suggestive connotation that it may engender as applied to toilet tissue, it seems clear from the record presented that by reason of extensive use and sales by opposer and its predecessors for over thirty years, the mark "SILK" has acquired distinctiveness as an indication or origin for opposer's toilet tissue and constitutes a valuable property right for opposer. Hence, opposer possesses a protectable interest therein sufficient to preclude the registration by a subsequent user of the same or a confusingly similar mark for like or similar goods. See: Clinton Detergent Company v. The Procter & Gamble Company, 133 USPQ 520 (CCPA, 1962); and Jenkins Publishing Company v. Metalworking Publishing Company, Inc., 137 USPQ 358 (CCPA, 1963).

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It is a well-established principle of trademark law, as urged by applicant, that, in determing the question of confusing similarity between marks, they must be considered in their entireties. But, as pointed out by the Board in The Singer Company v. Kay Jewelry Stores, Inc., 148 USPQ 614 (TT&A Bd., 1966):

> "it is an equally well-established rule that one word or feature of a mark may, by reason of its nature or manner of display be the dominent or most prominent feature thereof, and may, without doing violence to the aforementioned principle, be given greater force and effect than other parts of the mark in determining confusingly similarity between it and another mark used upon the same or closely related goods. See: California Prune & Apricot Growers Association v. Darby Flour Mills, Inc., 40 USPQ 616 (CCPA, 1939). L. J. Mueller Furnace Company v. United Conditioning Corporation, 106 USPQ 112 (CCPA, 1955); and American Drill Bushing Company v. Rockwell Manufacturing Company, 145 USPQ 144 (CCPA, 1965). That is to say, a feature of a mark may be displayed in such a significant and prominent manner

that purchasers may well rely upon this feature alone to identify and call for the goods in connection with which it is used."

132 In the instant case, it is apparent from a consideration of applicant's mark, as shown above, that such may be the situation herein. The designation "SILKO" is visibly the most prominent portion of applicant's mark, and considering the arbitrary character thereof as applied to applicant's goods, it is also the most significant portion and, by reason thereof, that feature by which purchasers generally would call for and identify applicant's goods. This is partially borne out by the purchaser orders made of record by applicant. In view thereof and considering the substantial similarities between "SILKO" and "SILK", it is concluded that the resemblances between the marks as a whole are such that there is a reasonable likelihood of confusion or mistake in the products sold thereunder.

Decision:

The opposition is sustained; and registration to applicant is refused.

APPENDIX C

UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

JAMES ALFRED MARTIN, *Appellant*,	October Term	1969.
v.	Patent Appeal No.	8225.
CROWN ZELLERBACH CORPORATION, *Appellee*.	Opposition No.	45,058.

March 26, 1970

RICH, Acting Chief Judge.

This appeal is from the decision of the Patent Office Trademark Trial and Appeal Board, sustaining the opposition of Crown Zellerbach Corporation to the registration by James Alfred Martin, doing business as Silko New Improved Products Company, of the composite mark "Silko 'Soft-as-silk' and red design," for toilet tissue. The mark is illustrated in the board's opinion, fully reported at 153 USPQ 141, knowledge of which is assumed. Appelleee's registrations include No. 254,779, April 2, 1929, of "SILK" for toilet paper; No. 385,382, February 25, 1941, of "Silk" for paper towels and facial tissue; and No. 580,312, September 22, 1953, of "Silk" for paper napkins, facial tissue, waxed paper, shelf paper and toilet tissue.

In addition to repeating arguments which he advanced below and contending that the board erred in not finding these arguments to be persuasive, appellant here contends that the board erred in the following respects: (1) in stating that "it must be assumed * * * that applicant's toilet tissue is basically the same as opposer's toilet tissue"; (2) in considering the sound of the parties' marks; and (3) in treating "SILKO" as

the dominant feature of appellant's mark and therefore giving it greater force and effect than the remainder of the mark.[1] Agreeing, as we do, with the board's reasoning and conclusions of fact and law, we will discuss only the specific contentions just mentioned.

With respect to the first of these contentions, appellant urges that since he applies his mark only to "2-ply facial quality toilet tissue" and since, according to him, appellee applies its "SILK" mark only to a "single ply toilet tissue," the board erred in assuming that the parties' goods are basically the same. Elaborating on this argument, appellant's brief states:

> We do not call the product toilet tissue but rather "beauty shop tissue" or just "tissue." * * * Our products are for dressing tables, hairdressers, and beauty shops. For that reason there is an inherent restriction in the goods.

It is clear from the board's opinion that the assumption of sameness was properly based on the observation that appellant's application and appellee's registrations both recite *"toilet tissue,"* as the goods to which their respective marks are applied, with "no limitation in either * * * as to quality, manner of handling the product, the channels of distribution, or the size or number of plies thereof * * *." Moreover, the implication that because of the nature and quality of appellant's product it is intended to be used only "for dressing tables, hairdressers, and beauty shops," is contradicted by at least two other statements in applicant's brief, viz.:

> When the product is sold for facial tissue or to beauty shops and the like, it is labeled, but *when sold as toilet paper*, it is generally unlabeled. [Emphasis added.]

and

> The channels of distribution are * * * *industrial concerns*, 5 & 10¢ stores, and owner-operated stores for Appellant's goods * * *. [Emphasis added.]

[1] We are aware that appellant alleges error in the board's refusal to let appellant, during the appeal period, amend the description of the goods. This, however, is not an appealable matter.

As the board said, "Toilet tissue is for all purposes toilet tissue * * *." Additionally, the record establishes that appellee has applied its "SILK" mark to 2-ply facial tissue, albeit in box rather than roll form.

Appellant's second contention, that the board should not have considered the sound of the parties' marks, is predicated on the somewhat vague assertion that

> The very nature of toilet tissue precludes it from being anything but a self-service item, in most of the stores today, toilet paper being bulky, low in price and a low profit staple item.

Appellant then cites two cases[2] in which the board and the Commissioner of Patents seem to have suggested that when the goods in question are "shelf items," similarity of the sound of the marks is not particularly significant. Appellant's toilet tissue is no doubt a "shelf item," but the present record clearly indicates that it is not a product which purchasers never ask for by name. For example, a sundries store owner and operator called as a witness *by appellant* testified:

> Q75. When a customer orders that [appellant's tissue], how does he order it?
>
> A. Well, we have built up quite a business on the tissue. They know it is a double ply tissue and come in and *ask for that Silko Tissue*. If I don't have the bag, I tell them it is not wrapped, but it is the same tissue and they look at it and say, yeah, that's what I got last time.
>
> Q76. *But they ask for Silko Tissue?*
>
> A. *Yes, they do.* [Emphasis added.]

Finally, as to whether the board properly treated "SILKO" as the dominant feature of appellant's mark, appellant points out, and we agree, that marks must be considered in their entireties. This is not to say, however, that, in considering whether a mark (as an entirety) will be likely to cause confusion, one cannot consider one feature of the mark as being more significant to that issue than are the other features.

[2] *Crown Zellerbach Corp.* v. *Gulf States Paper Corp.*, 150 USPQ 709 (TTAB 1966), and *Southern Shell Fish Co.* v. *S. Felicione & Sons Fish Co.*, 108 USPQ 289 (Com'r. 1956).

Here it is clear that "SILKO" is the dominant feature of appellant's mark and likely the only feature which purchasers would rely upon to identify, call for, or refer to the goods. Accordingly, we think the board properly gave greater force and effect to "SILKO" than to the other features of the mark.

The decision of the board is *affirmed*.

AFFIRMED

BALDWIN, J., concurs in the result.

APPENDIX D

UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

October Term, 1969

JAMES ALFRED MARTIN,
APPELLANT,

v. PATENT APPEAL NO. 8225

CROWN ZELLERBACH CORPORATION,
APPELLEE

A PETITION for rehearing having been filed in this case, UPON CONSIDERATION THEREOF, it is ordered by this Court that the said petition be, and the same is hereby, denied.

May 21, 1970.

BY ORDER OF THE COURT:

(Signed) GEORGE E. HUTCHINSON
Clerk

APPENDIX E

STATUTORY PROVISIONS INVOLVED

Constitution of the United States

Preamble

We, the people of the United States, in order to * * * * secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America

Article I

Section 1—Legislative powers: in whom vested:

All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

* * * * * * *

* * * * * * *

* * *

Section 8—Powers of Congress

* * * *

3. To regulate commerce with foreign nations, and among the several States and with the Indian tribes.

* * * *

8. To promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive rights to their respective writings and discoveries.

* * * * *

10. To define and punish piracies and felonies committed on the high seas, and offenses against the law of nations.

* * * * *

18. To make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof.

* * * * *

(Emphasis added)

Statutes:

Act of May 4, 1906, 34 Stat. 168 15 USC Sec. 131, amending the Trademark Act of February 20, 1905, 33 Stat. 724, 15 USC Se. 81.

Sec. 2. That the Commissioner of Patents shall establish classes of merchandise for the purpose of trade-mark registration, and shall determine the particular descriptions of goods comprised in each class. On a single application for registration of a trade-mark the trade-mark may be registered at the option of the applicant for any or all goods upon which the mark has actually been used comprised in a single class of merchandise, provided the particular descriptions of goods be stated. (Emphasis added).

Trademark Act of 1946, as amended, 60 Stat. 427, 15 USC 1051.

Intent of Act. The intent of this Act is to regulate commerce within the control of Congress by making actionable the deceptive and misleading use of marks in such commerce; to protect registered marks used in such commerce from interference by State, or territorial legislation; to protect persons engaged in such commerce against unfair competition; to prevent fraud and deception in such commerce by the use of reproductions, copies, counterfeits, or colorable imitations of registered marks; and to provide rights and remedies stipulated by treaties and conventions respecting trademarks, trade names, and unfair competition entered into between the United States and foreign nations (Amended Oct. 9, 1962, 76 Stat. 769).

Sec. 45 (15 U. S. C. 1127.) (Emphasis added).

* * * * *

Sec. 2. Trademarks registrable on the principal register.

No trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it—* * * * (d) consists of or comprises a mark which so resembles a mark registered in the Patent Office or a mark or trade name previously used in the United States by another and not abandoned, as to be likely, when applied to the goods of the applicant, to cause confusion, or to cause mistake, or to deceive: Provided, * * *.

Sec. 7 (d) (15 USC 1057d). Certificate of registration of registration—Surrender, cancelation, amendment of disclaimer by registrant. * * * *

Upon application of the registrant the Commissioner may permit any registration to be surrendered for cancelation, and upon cancelation, and upon cancelation appropriate entry shall be made in the records in the Patent Office. Upon application of the registrant and payment of the prescribed fee, the Commissioner for good cause may permit any registration to be amended or to be disclaimed in part: provided, That the amendment or disclaimer does not alter materially the character of the mark. * * * * (Emphasis added).

Sec. 30 (15 USC 1112). Classification of goods and services—Registration in a plurality of classes.

The Commissioner may establish a classification of goods and services, for convenience of Patent Office administration, but not to limit or extend the applicant's rights. The applicant may file an application to register a mark for any or all of the goods and services upon or in connection with which he is actually using the mark: Provided, * * * * (Emphasis added).

Sec. 46 (b) Existing registrations under prior acts.

Acts of 1881 and 1905. Registrations now existing under the Act of March 3, 1881, or the Act of February 20, 1905, shall continue in full force and effect for the unexpired terms thereof and may be renewed under the provisions of section 9 of this Act. * * * *

Sec. 49 Preservation of existing rights.

Nothing herein shall adversely affect the rights or the enforcement of rights in marks acquired in good faith prior to the effective date of this Act (15 USC 1051 note). (Emphasis added).

Amendment of August 8, 1958, 72 Stat. 540.

(a) Section 17 (15 U. S. C. 1067) is amended by striking the words "the examiner in charge of interferences" and substituting in lieu thereof "a Trademark Trial and Appeal Board," and by adding the following paragraph at the end thereof:

"The Trademark Trial and Appeal Board shall include the Commissioner, the Assistant Commissioners, and such Patent Office employees, designated by the Commissioner and whose qualifications have been approved by the Civil Service Com-

mission as being adequate for appointment to the position of examiner in charge of interferences. Each case shall be heard by at least three members of the Board, the members hearing such case to be designated by the Commissioner." (Emphasis added).

Rules of Practice of the Patent Office.

2.51 Drawing required.

(d) If the application is for the registration only of a word, letter or numeral, or any combination thereof, not depicted in special form, the drawing may be the mark typed in capital letters on paper, otherwise complying with the requirements of rule 2.52. (Emphasis added).

Classification of merchandise under the Act of May 4, 1906 (15 USCA following Section 131)

1. Raw or partly prepared materials
3. Receptacles.
3. Baggage, animal equipments, portfolios, and pocketbooks.
4. Abrasive, detergent, and polishing materials.
5. Adhesives.
6. Chemicals, medicines, and pharmaceutical preparations.
7. Cordage.
8. Smokers' articles, not including tobacco products.
9. Explosives, firearms, equipments, and projectiles.
10. Fertilizers.
11. Inks and inking materials.
12. Construction materials.
13. Hardware and plumbing and steam-fitting supplies.
14. Metals and metal castings and forgings.
15. Oils and greases.
16. Paints and painters' materials.
17. Tobacco products.
18. Agricultural and Dairy Equipment. (Note: This Class was abolished February 24, 1909. New Class 18 was started in November 1949 and cosisted of: Medicines and Pharmaceutical Preparations, taken from Class 6.)
19. Vehicles, not including engines.
20. Linoleum and oil cloth.
21. Electrical apparatus, machines, and supplies.

22. Games, toys, and sporting goods.
23. Cutlery, machinery, and tools, and parts thereof.
24. Laundry appliances and machines.
25. Locks and safes.
26. Measuring and scientific appliances.
27. Horological instruments.
28. Jewelry and precious-metal ware.
29. Brooms, brushes, and dusters.
30. Crockery, earthenware, and porcelain.
31. Filters and refrigerators.
32. Furniture and upholstery.
33. Glassware.
34. Heating, lighting, and ventilating apparatus.
35. Belting, hose, machinery packing, and nonmetallic tires.
36. Musical instruments and supplies.
37. Paper and stationery.
38. Prints and publications.
39. Clothing.
40. Fancy goods, furnishings, and notions.
41. Canes, parasols, and umbrellas.
42. Knitted, netted, and textile fabrics.
43. Thread and yarn.
44. Dental, medical, and surgical appliances.
45. Beverages, nonalcoholic.
46. Foods and ingredients of foods.
47. Wines.
48. Malt beverages and liquors.
49. Distilled alcoholic liquors.
50. Merchandise not otherwise classified.

Note: New Class 51 consisting of Cosmetics and Toilet Preparations and new Class 52 consisting of Detergents and Soaps were added in November, 1949. (Notes were supplied by Petitioner.)

Form 4.1 Trademark application by an individual; Principal Register with oath.

* * * * * The above identified applicant has adopted and is using the trademark shown in the accompanying drawing (1) for

_____

(Common, usual or ordinary name of goods)

and requests that said mark be registered in the United States Patent Office on the Principal Register established by the act of July 5, 1946. * * * *